

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL D. CORNS
Claimant

VS.

CITY OF WICHITA
Self-Insured Respondent

)
)
)
)
)
)
)

Docket Nos. 1,052,342
& 1,052,343

ORDER

Claimant appealed the April 24, 2012, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on July 25, 2012. Jeffrey E. King, of Salina, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of former Board Member David A. Shufelt.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. On February 1, 2012, the parties entered into a Stipulation, which provided that: (1) the date of accident in both docket numbers is August 1, 2010; (2) claimant's average weekly wage without fringe benefits was \$1,255.24; and (3) claimant received fringe benefits of \$495.33, and claimant's average weekly wage with fringe benefits was \$1,750.57. At oral argument the parties stipulated that: (1) in Docket No. 1,052,343, claimant sustained a 20% permanent partial whole body impairment; (2) in both claims, future medical benefits will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation; and (3) claimant has a 100% wage loss and a 0% task loss in each claim for a 50% work disability.

ISSUES

In the Application for Hearing filed with the Division of Workers Compensation (Division) by claimant on September 3, 2010, in Docket No. 1,052,342, claimant alleged injuries to his neck, low back and both legs from a fall on or about August 1, 2010. A second Application for Hearing was filed with the Division by claimant on that same date in Docket No. 1,052,343, in which claimant alleged pulmonary injuries from exposure to smoke and fumes in a series of accidents from "July 31, 2002 and each and every workday through the present."¹ As indicated above, in a Stipulation filed with the Division by the parties on February 1, 2012, the parties agreed the date of accident in both claims is August 1, 2010.

In his April 24, 2012, Award, ALJ Clark found claimant sustained a 29% whole body functional impairment and a 50% work disability. Claimant was awarded permanent partial disability benefits not to exceed \$100,000.00.

Claimant appealed, listed nature and extent as the issue in his applications for review, and indicated that he "would prefer to submit the matter to the Board by Oral argument in person."² Neither party submitted a brief to the Board prior to the statutory time limit. Only after the Board contacted the parties did they submit letters to the Board indicating the underlying issue was whether claimant was entitled to a separate award in each claim. Claimant did provide ALJ Clark with a submission letter in each claim.

Claimant argues ALJ Clark erred by consolidating both claims into one award of \$100,000.00, less amounts previously paid. It is asserted by claimant that ALJ Clark should have issued a separate award in each docketed claim of \$100,000.00 each. Claimant contends that he suffered two separate and distinct injuries, a single traumatic event in Docket No. 1,052,342 and a repetitive injury in Docket No. 1,052,343.

Respondent asks the Board to affirm the Award of ALJ Clark. In the alternative, respondent requests that in one of the claims, it be given a credit pursuant to K.S.A. 44-510a.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's permanent functional impairment in Docket No. 1,052,342?

¹ Application for Hearing in Docket No. 1,052,343 (filed Sept. 3, 2010).

² Application for Review in Docket No. 1,052,342 (filed Apr. 26, 2012) and Application for Review in Docket No. 1,052,343 (filed Apr. 26, 2012).

2. Is claimant entitled to a separate award in each claim or should both claims be consolidated into one award not exceeding \$100,000.00?

3. If claimant is entitled to a separate award in each claim, is respondent entitled to a K.S.A. 44-510a credit in one of the claims? If so, in which claim is the credit applied, and what is the amount of the credit?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Docket No. 1,052,342:

At the time of the regular hearing, claimant had been employed by respondent as a firefighter for over 21 years. His actual job title was medical captain, but during his shift, he would respond to every fire. On August 1, 2010, claimant responded to an accident call. A drunken driver had left the road and crashed into a ravine, causing the vehicle to land upside down in water. As claimant and other rescuers were observing the automobile, someone from behind bumped him, causing him to fall forward. Claimant stepped onto the overturned automobile and his head struck a rear tire. His toes were turned and as he pulled them out his legs began to hurt. His rear also hit an embankment in the fall. Claimant testified he had knee, back and neck pain and on August 1, 2010, was placed on light duty.

As a result of the accident in Docket No. 1,052,342, claimant received conservative care from Drs. Sandra Barrett, George G. Fluter and Travis Hubin. Upon the advice of Dr. Fluter, claimant left his employment on March 5, 2011, and since then has not worked anywhere. On September 28, 2011, respondent determined claimant was qualified for disability retirement benefits.

Dr. Fluter began treating claimant on October 20, 2005, for a work-related back injury he received in 1991. Between 1991 and 2005, another physician had treated claimant's back. As a result of the 1991 back injury, claimant received a lumbar laminectomy and discectomy. Dr. Fluter testified he provided medical care for claimant's chronic low back and bilateral leg pain through the date of his deposition, January 30, 2012. The parties stipulated that claimant received an award for the 1991 injury based upon a 10% permanent impairment of function to the body as a whole.³

Claimant was evaluated at the request of his attorney by Dr. Fluter on February 14, 2011. Dr. Fluter's report indicated Dr. Hubin provided claimant treatment from August 4,

³ Fluter Depo. at 9.

2010, through September 8, 2010, and Dr. Barrett provided claimant treatment from November 1, 2010, through December 10, 2010. Dr. Fluter testified that when he saw claimant, claimant was status post the August 1, 2010, work-related injury, and had neck and upper back pain; cervicothoracic strain/sprain; right knee pain with a right knee strain/sprain and possible internal derangement of the right knee; and left knee pain with a left knee strain/sprain and possible internal derangement of the left knee. He also testified claimant had low back and right lower extremity pain that was an exacerbation/aggravation of that condition.⁴

Dr. Fluter gave claimant a 5% whole body impairment related to the neck and upper back; a 10% impairment to the right lower extremity for mild knee range of motion deficits, which is the equivalent of a 4% whole body impairment; and a 2% whole body impairment for exacerbation/aggravation of the low back and right lower extremity pain. Using the combined values chart, the foregoing permanent impairments combined for an 11% permanent impairment of function to the body as a whole. Dr. Fluter testified the 2% whole body impairment for exacerbation/aggravation of the low back and right lower extremity pain was in addition to claimant's 10% permanent impairment that resulted from the 1991 injury. When asked why he did not find claimant had a permanent impairment of the left lower extremity, Dr. Fluter testified there was no deficit in the range of motion.

Dr. Fluter testified that according to the combined values chart in the *Guides*,⁵ combining the 11% permanent impairment of function with the 20% assigned by Dr. Kerby for claimant's pulmonary condition (see below for a more detailed discussion) results in a 29% permanent functional impairment to the body as a whole.

At the request of his attorney, claimant was evaluated by Dr. Pedro A. Murati on June 6, 2011. His diagnosis was: (1) aggravation of low back pain with signs and symptoms of radiculopathy, (2) myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinals, (3) left patellofemoral syndrome, (4) right knee sprain, and (5) bilateral anterior cruciate laxity. Using Table 62 of the *Guides*, Dr. Murati assigned claimant a 5% permanent impairment of the left lower extremity for patellofemoral syndrome of the left knee and, using Table 64, a 7% permanent impairment of the left lower extremity for cruciate laxity of the left knee. The foregoing impairments combine and convert to a 5% whole person impairment. He also determined claimant had a 4% whole person impairment for the right lower extremity. He placed claimant in Cervicothoracic DRE Category II for a 5% whole person impairment and a 5% whole person impairment for aggravation of low back pain with signs and symptoms of radiculopathy. Using the combined values chart, Dr. Murati indicated claimant had an 18% permanent impairment

⁴ *Id.*, at 11.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

of function to the whole body. Dr. Murati indicated the 5% low back impairment for this injury was in addition to any preexisting impairment claimant had.

Docket No. 1,052,343:

In July 2002, claimant responded to a house fire. He and others entered the home because of a suspicion that someone was still in the home. Claimant was wearing a new air pack, which malfunctioned. Claimant could not catch his breath after exiting the flame-engulfed house. The air packs were later recalled by the manufacturer because they were defective. Claimant received minimal medical treatment, which included two breathing treatments at the emergency room and a prescription for a Proventil inhaler.

Claimant testified that over time, his pulmonary issues have worsened. In December 2008, he was hospitalized for left lower lobe streptococcal pneumonia. Claimant continued to be exposed to smoke and other irritants at fires. He kept the inhaler with him at all times. Claimant indicated that after August 1, 2010, he was placed on light duty. Consequently, claimant was no longer exposed to irritants, because he was not required to respond to fire calls.

On February 8, 2011, claimant was evaluated by Dr. Gerald R. Kerby, an internal medicine and pulmonary specialist at the University of Kansas Medical Center. Dr. Kerby opined that after the 2002 incident, claimant never became asymptomatic or normal. Claimant testified he was advised by Dr. Kerby to avoid being exposed to irritants.

Dr. Kerby ultimately diagnosed claimant with irritant-induced asthma, which was caused by inhalation of smoke as a firefighter. He also noted claimant has evidence of mild bronchiectasis, which is also a complication of smoke inhalation. Dr. Kerby indicated claimant does not tolerate exposure to smoke or other irritants and is unable to perform moderate or severe exertion because of limitations of his lung disease. Dr. Kerby testified claimant could not carry heavy equipment and breathing apparatus and be around smoke, as claimant will have more symptoms with increased exercise. However, claimant could do office-type jobs that firefighters perform. Dr. Kerby found claimant was at maximum medical improvement and pursuant to the *Guides*, classified claimant as Class 2 or a 20% permanent impairment of function to the whole body.

ALJ Clark's Award:

ALJ Clark adopted the respective opinions of Drs. Fluter and Kerby that claimant sustained a whole body impairment of 11% in Docket No. 1,052,342 and 20% in Docket No. 1,052,343. He then utilized the opinion of Dr. Fluter that the aforementioned whole body impairments combined for a 29% permanent functional impairment. No physician testified as to claimant's task loss. Consequently, ALJ Clark found claimant had a 0% task loss and a 100% wage loss, which results in a 50% permanent partial disability. He also awarded claimant all outstanding medical and unauthorized medical up to the statutory

limit. ALJ Clark found that future medical would be considered upon proper application to the Director.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁶ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁷

ALJ Clark adopted Dr. Flutter’s opinion that in Docket No. 1,052,342, claimant sustained an 11% whole person impairment, but did not indicate why he adopted Dr. Flutter’s opinion. Dr. Flutter was claimant’s physician before the August 1, 2010, accident and was familiar with claimant’s pre-existing low back condition. He was aware claimant had a 10% permanent impairment of the low back as a result of a 1991 accident. Dr. Flutter opined that as a result of the August 1, 2010, accident claimant sustained an additional 2% permanent impairment for the low back. The permanent impairments Dr. Murati assigned claimant differed from those of Dr. Flutter in two important respects. First, Dr. Murati gave claimant a 5% permanent impairment for the low back which resulted from the August 1, 2010, accident, while Dr. Flutter provided a 2% permanent impairment. Second, Dr. Murati assigned claimant a 5% whole person impairment for the left lower extremity while Dr. Flutter gave claimant no permanent impairment for the left lower extremity. The Board finds that the opinion of Dr. Flutter is more credible, and concludes that in Docket No. 1,052,342, claimant has a permanent functional impairment of 11% to the body as a whole for the neck and upper back, right lower extremity and low back injuries sustained in Docket No. 1,052,342.

Claimant asserts that ALJ Clark erred by combining both claims into one award. The Board concurs, and finds that claimant had two separate and distinct accidents and resulting injuries and, therefore, an award should have been issued in each claim. The Board is cognizant of the fact that the parties stipulated the date of accident in both claims is August 1, 2010. However, that fact alone is not sufficient justification to combine the claims into one award.

It is undisputed that in Docket No. 1,052,342, claimant sustained musculoskeletal injuries as the result of a single traumatic accident. In Docket No. 1,052,343, claimant suffered a pulmonary injury as a result of repetitive exposure to smoke and other irritants. Claimant began having pulmonary problems when his air pack did not function correctly

⁶ K.S.A. 2010 Supp. 44-501(a).

⁷ K.S.A. 2010 Supp. 44-508(g).

during a July 2002 fire. Claimant testified that since the 2002 fire, his condition has worsened. Dr. Kerby indicated claimant does not tolerate exposure to smoke or other irritants. Simply put, the record before the Board proves by a preponderance of the evidence that claimant sustained two separate work-related accidents.

In Docket No. 1,052,343, the Board, pursuant to K.S.A. 44-510a, reduces claimant's permanent partial disability benefits by deducting the number of weeks of work disability awarded claimant in Docket No. 1,052,342. K.S.A. 44-510a states:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

The Board chooses to give the credit to respondent in Docket No. 1,052,343 for work disability benefits paid to claimant in Docket No. 1,052,342, rather than in the reverse order. Claimant filed Docket No. 1,052,342 first. That may have been a matter of luck or coincidence but, nevertheless, the single traumatic accident was the first docketed claim. More convincing is the fact that claimant testified he quit work at the recommendation of Dr. Fluter, who examined claimant for the injuries he suffered in Docket No. 1,052,342. More succinctly, it was the permanent injuries suffered by claimant in Docket No. 1,052,342 that caused his wage loss.

The Kansas Court of Appeals decision in *Rivas*⁸ provides guidance. Rivas had two injuries. The first injury was to his low back. Rivas later sustained bilateral shoulder injuries and filed a second claim. In the shoulder claim, IBP requested a reduction in benefits pursuant to K.S.A. 44-510a because claimant's low back injury contributed to his wage loss. Rivas countered that no evidence was presented by an expert witness to show that he would not have suffered bilateral shoulder injuries but for his low back injury. IBP countered that Rivas' low back injury caused his loss of earning power. The Kansas Court of Appeals found that the back injury and bilateral shoulder injuries contributed together to cause Rivas' loss of earning power. The Court stated:

In this case, Rivas' earning power was restored when the wage loss was awarded in the case involving Rivas' low back injury. K.S.A. 44-510a(a) only allowed the Board to reduce the award for the bilateral shoulder injuries "by the percentage of contribution that the prior disability contributes to the overall disability following the later injury." In order to properly apply K.S.A. 44-510a to the present case, the term "disability" must refer to a disability award. Under this interpretation, Rivas' disability award for the lower back claim contributed 100% to the wage loss portion of the disability award in the bilateral shoulder claim. Thus, K.S.A. 44-510a is applicable. Accordingly, the Board did not err in granting a credit to IBP, Inc.

The Board wants to clarify it is giving respondent a credit for overlapping weeks of permanent partial work disability only. It is not giving respondent a credit for overlapping weeks of permanent partial functional disability.

CONCLUSION

1. In Docket No. 1,052,342, claimant is awarded an 11% whole body permanent functional impairment and a 50% work disability.
2. A separate award is entered in Docket No. 1,052,343, finding that claimant has a 20% whole body permanent functional impairment and a 50% work disability.
3. The permanent disability benefits paid in Docket No. 1,052,342 for the neck, upper back, right lower extremity and low back injuries shall be deducted from the weekly permanent disability benefits due for the pulmonary injury in Docket No. 1,052,343, for any overlapping weeks of permanent partial work disability.
4. No credit is given in Docket No. 1,052,343 for the weeks of permanent partial functional disability payments that claimant received in Docket No. 1,052,342.

⁸ *Rivas v. IBP, Inc.*, Nos. 94,649 & 94,650, 2006 WL 2265087 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006, *rev. denied* Nov. 8, 2006).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the April 24, 2012, Award entered by ALJ Clark by finding that separate awards should be entered in Docket Nos. 1,052,342 and 1,052,343. The Board also concludes:

In Docket No. 1,052,342, Michael D. Corns is granted compensation from the City of Wichita for an August 1, 2010, accident and resulting disability. Claimant's average weekly wage without fringe benefits of \$1,255.24 and his average weekly wage with fringe benefits of \$1,750.57 both result in a maximum weekly compensation rate of \$545.00. Mr. Corns is entitled to receive the following disability benefits:

For the period ending March 5, 2011, Mr. Corns is entitled to receive 30.86 weeks of permanent partial whole body functional disability benefits at \$545.00 per week, or \$16,818.70, for an 11% permanent partial whole body functional disability.

For the period commencing March 6, 2011, Mr. Corns is entitled to receive 152.63 weeks of permanent partial general disability benefits at \$545.00 per week, or \$83,181.30, for a 50% permanent partial general disability. The total award is not to exceed \$100,000.00.

As of October 10, 2012, Mr. Corns is entitled to receive 114.43 weeks of permanent partial general disability compensation at \$545.00 per week, or \$62,364.35, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$37,635.65 shall be paid at \$545.00 per week until paid or until further order of the Director.

In Docket No. 1,052,343, Michael D. Corns is granted compensation from the City of Wichita for an August 1, 2010, accident and resulting disability. Claimant's average weekly wage without fringe benefits of \$1,255.24 and his average weekly wage with fringe benefits of \$1,750.57 both result in a weekly maximum compensation rate of \$545.00. Mr. Corns is entitled to receive the following disability benefits:

For the period ending March 5, 2011, Mr. Corns is entitled to receive 30.86 weeks of permanent partial whole body functional disability benefits at \$545.00 per week, or

⁹ K.S.A. 2011 Supp. 44-555c(k).

\$16,818.70, for a 20% permanent partial whole body functional disability, all of which is due and owing less any amounts previously paid.

For the period commencing March 6, 2011, Mr. Corns is entitled to receive 152.63 weeks of permanent partial general disability benefits at \$545.00 per week, or \$83,181.30, for a 50% permanent partial general disability. The total award is not to exceed \$100,000.00.

Beginning with the permanent partial disability compensation commencing on March 6, 2011, respondent is given a credit pursuant to K.S.A. 44-510a for 152.63 weeks of permanent partial general disability benefits at \$545.00 per week, or \$83,181.30, that was awarded claimant in Docket No. 1,052,342.

Claimant's attorney filed a contract for attorney fees with the Division, but ALJ Clark's Award did not approve said contract. Therefore, this matter is remanded to ALJ Clark to address approval of the contract for attorney fees.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
rob@ksworkcomplaw.com; fdesk@ksworkcomplaw.com

Edward D. Heath, Jr., Attorney for Respondent
heathlaw@swbell.net

John D. Clark, Administrative Law Judge